PETIT
FOR WR
CERTIO

TION
RIT OF
ORARI

Supreme Court, U.S.
FILED
MAY 28 1993
OFFICE OF THE CLERK

No. 92-1891

IN THE

Supreme Court of the United States

October Term, 1992

THOMAS OOT,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN A. CIRANDO, ESQ.
D.J. & J.A. CIRANDO, ESQS.
Suite 1010
Onondaga Savings Bank Building
101 South Salina Street
Syracuse, New York 13202
(315) 474-1285

Counsel of Record for Petitioner

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
(S3111—LC9-846—1993)

27pp

QUESTION PRESENTED

Whether the Government violated its Plea Agreement with petitioner when it opposed his request for a specific sentence, after having agreed not to recommend any specific sentence?

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 2

Jurisdiction 2

Constitutional and Statutory Provisions ...2

Statement of the Case 3

Reasons for Granting the Writ 8

Conclusion 15

THE PETITION FOR CERTIORARI
SHOULD BE GRANTED.

INDEX TO APPENDIX

Appendix A - Opinion of the United States Court of Appeals, Second Circuit, Decided April 8, 1993 .....A-1

Appendix B - United States Constitution, Fifth Amendment B-1

Appendix C - Federal Rule of Criminal Procedure, Rule 11(e) C-1

TABLE OF AUTHORITIES

PAGE

CASES:

United States v. Brody, 808 F.2d 944 [2nd Cir. 1986].....14

United States v. Carbone, 739 F.2d 45 [2nd Cir. 1984].....11, 12, 14

United States v. Corsentino, 685 F.2d 48 [2nd Cir. 1982].....11, 14

United States v. Casamento, 887 F.2d 1141 (2nd Cir. 1989) cert. den. 493 U.S. 1081.....14

United States v. Stolon, F.Supp 63 [E.D.N.Y. 1983].....14

United States v. Weinberg, 852 F.2d 681 [2nd Cir. 1988].....12

STATUTES:

Federal Rules of Criminal Procedure, Rule 11(e).....3, 8

Title 18 U.S.C. § 371.....4, 9

Title 21 U.S.C. § 846.....4, 9

Title 28 U.S.C. § 1254(1) 2

United States Constitution, Fifth Amendment 2

OTHER:

U.S.S.G. § 5K1.1 .....6, 10

IN THE

Supreme Court of the United States

October Term, 1992

THOMAS OOT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Thomas Oot, respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Second Circuit rendered in the above entitled proceeding on April 8, 1993.

OPINIONS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit will not be officially reported. It is reproduced in Appendix A, infra.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was dated and entered April 8, 1993. The mandate was issued on April 29, 1993.

The jurisdiction of this Court to review that judgment by a writ of certiorari is conferred by Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fifth Amendment

> No person shall be...deprived of life, liberty, or property, without due process of law...

Federal Rules of Criminal Procedure, Rule 11(e)

Plea Agreement Procedure

* * *

(1) In general. The attorney for the government...may.....(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court

* * *

STATEMENT OF THE CASE

Petitioner was arrested in regard to this matter on October 7, 1991, and at that time agreed to assist the Government (JA-32)[1]. On November 29, 1991, the Government, pursuant to Federal Rule of Criminal Procedure Rule 11(e), entered into a Plea Agreement with petitioner whereby petitioner would waive indictment and enter a plea of guilty to an information

---

[1]Reference is to the Petitioner's Joint Appendix that was filed in the Court of Appeals.

charging him with the pre-guideline crimes of CONSPIRACY TO DISTRIBUTE COCAINE (Title 21 U.S.C. § 846), and CONSPIRACY TO DEFRAUD THE UNITED STATES AND THE IRS BY IMPEDING THE FUNCTIONS OF THE IRS (Title 18 U.S.C. § 371); co-operate fully, and truthfully with the Government; and pay all taxes, penalties, and interest owed to the IRS (JA-5-10). In return thereof the Government agreed that it would not recommend any specific sentence to the sentencing Judge but it would recommend that any sentence be concurrent (JA-8).

On November 29, 1991, petitioner waived his right to prosecution by indictment on the pre-guideline charges of CONSPIRACY TO DISTRIBUTE COCAINE, and CONSPIRACY TO DEFRAUD THE UNITED STATES AND THE IRS BY IMPEDING THE FUNCTIONS OF THE IRS and consented to the disposition of the case, on an information (JA-11-13).

On that same day, while represented by counsel, petitioner pled guilty to the pre-guideline crimes of CONSPIRACY TO DISTRIBUTE

COCAINE, and CONSPIRACY TO DEFRAUD THE UNITED STATES AND THE IRS BY IMPEDING THE FUNCTIONS OF THE IRS (JA-14-31).

The Government then requested that sentencing be adjourned without date pending petitioner's cooperation with them (JA-28).

Petitioner's cooperation with the Government was excellent (JA-33). His cooperation was truthful, candid, and complete (JA-33). The timely cooperation provided by petitioner was probably a factor which prompted all of his co-defendant's to plead guilty (JA-32).

At sentencing, on December 8, 1992, defense counsel related: petitioner's renunciation of the conspiracy five (5) years before his arrest; petitioner's rehabilitation from his addiction problem; petitioner's loss of his license to practice law; petitioner's desire to co-operate fully with the Government; petitioner's assistance to others both on a personal and professional level; and petitioner's family situation--happily married

parents of four (4) young girls who are expecting their fifth child in January of 1993[2] (JA-40-43).

The Government then detailed the extent and nature of petitioner's cooperation since the day of his arrest: petitioner's cooperation was full and candid; petitioner related truthfully and in great detail not only the extent of his involvement but also the extent of his knowledge of the involvement of others; petitioner provided truthful and forthright information on all occasions; and petitioner was fully prepared to testify for the Government at a co-defendant's trial before that co-defendant pled guilty (JA-44-46). Furthermore, had this been a "Guideline case," the Government would have moved for a downward departure based on petitioner's substantial assistance to the authorities (see U.S.S.G. § 5K1.1) (JA-46).

---

[2]Their son Joseph was born on January 31, 1993.

Defense counsel then specifically requested that petitioner not be incarcerated, but that he be sentenced to serve a period of community service under the supervision of Sister Margaret Tierney (JA-46-47).

The District Court then asked the Government to comment on that request (JA-47). The Government recognizing that it had specifically agreed not to make any sentencing recommendation, nevertheless stated to the District Court, that it could not agree with defense counsel's position that petitioner not be incarcerated (JA-47).

Petitioner was then sentenced to serve concurrently a jail term of eighteen (18) months on each charge, to pay a fine of $2,000, to pay all taxes, penalties and interest to the IRS[3], and to pay a special assessment of $100 (JA-48-50, 52-53). Notice of Appeal was

---

[3]The District Court acknowledged that appellant had paid the monies due the IRS prior to sentencing as his Plea-Agreement provided (JA-9, 49, 52).

filed on December 16, 1992 (JA-55). Petitioner has been released during the pendency of his appeal (JA-4).

On April 8, 1993, the United States Court of Appeals for the Second Circuit affirmed petitioner's conviction finding that the government did not recommend a "specific sentence", but rather presented an argument "relevant to sentencing" (Appendix A).

REASONS FOR GRANTING THE WRIT

THE GOVERNMENT VIOLATED ITS PLEA AGREEMENT WHEN IT OPPOSED PETITIONER'S REQUEST FOR A SPECIFIC SENTENCE, AFTER HAVING AGREED NOT TO RECOMMEND ANY SPECIFIC SENTENCE.

The underlying Plea Agreement pursuant to Rule 11(e) of the Federal Rules of Criminal Procedure provided, in part:

> 10. . . . nor will it [the Government] recommend any specific sentence to the sentencing Judge. However, the Government will inform the sentencing Judge and the Probation Department of (1) this agreement, (2) the nature and extent of Thomas Oot's activities with respect to this case; and (3) the full nature and extent of Thomas Oot's cooperation and the date when such cooperation commenced. Furthermore, the Government retains the right to present the sentencing Judge and Probation Department . . . any and all facts and arguments relevant to sentencing (JA-8-9).

On November 29, 1991, petitioner based on the aforementioned Plea Agreement, entered a plea of guilty to the pre-guideline crimes of CONSPIRACY TO DISTRIBUTE COCAINE (Title 21 U.S.C. §846), and CONSPIRACY TO DEFRAUD THE UNITED STATES & THE IRS BY IMPEDING THE FUNCTIONS OF THE IRS (Title 18 U.S.C. §371) (JA-25-26, 28).

Prior to sentencing, the Assistant United States Attorney had written to the District Court and set forth the nature and extent of petitioner's cooperation (JA-32-33).

At sentencing on December 8, 1992, the Assistant United States Attorney, as allowed by

the Plea Agreement, full detailed the extent and nature of petitioner's cooperation with the Government (JA-43-46).

Had this been a "Guideline case", the Assistant United States Attorney would have moved for a downward departure based upon petitioner's substantial assistance to the authorities (see U.S.S.G. §5K1.1) (JA-46).

Defense counsel, then requested that petitioner not be incarcerated, but that he be sentenced to serve a period of community service (JA-46-47). The District Court then asked the Assistant United States Attorney to comment on that request (JA-47).

The Assistant United States Attorney, recognizing that the Government had specifically agreed not to make any sentencing recommendation, nevertheless stated to the District Court that the Government could not agree with defense counsel's position because of "the factual findings of what brought us here today" (JA-47).

The District Court then proceeded to sentence petitioner to serve a maximum of eighteen (18) months in jail, pay a $2,000.00 fine, pay all taxes, penalties, and interest to the IRS, and pay a special assessment of $100.00 (JA-49-50).

Contrary to the express terms of paragraph 10 of its Plea Agreement with petitioner, the Government specifically opposed defense counsel's request to the District Court that petitioner not be incarcerated (JA-47).

In United States v. Carbone (739 F.2d 45 [2nd Cir. 1984]), the Government promised that it would make no recommendation to the District Court as to the sentence Carbone may be given. At sentencing, however, the Government, strenuously objected to defense counsel's request for a specific sentence (Carbone, supra at 46).

The Second Circuit, relying on its holding in United States v. Corsentino (685 F.2d 48, 51 [2nd Cir. 1982]), wherein it stated, over the Government's claim that the promise to take no

position meant only that it would not recommend a specific sentence, that a plausible interpretation of the Plea Agreement was that

> the Government would make no comment to the sentencing judge, either orally at sentencing or in writing prior to sentencing, that bears in any way on the type or severity of the sentence to be imposed (Carbone, supra at 46-47).

It is respectfully submitted that, as in Carbone (supra), the instant Plea Agreement did not allow the Government to make any comment as to the type or severity of sentence to be imposed (JA-5-10). However, the Assistant United States Attorney clearly breached that Plea Agreement when he specifically opposed defense counsel's request that petitioner not be incarcerated (JA-47)[4] (cf., United States v. Weinberg, 852 F.2d 681, 667-668 [2nd Cir. 1988] -- where the Government's comments about the nature of the defendant's involvement did not include a specific sentence recommendation and

---

[4]The Assistant United States Attorney readily acknowledged this breach in the District Court (JA-47).

did not violate that Plea Agreement to make no specific sentence recommendation).

Since petitioner was to be sentenced for non-guideline crimes, the full range of sentencing options were available to him (JA-26-27). The essence of his Plea Agreement with the Government--that the Government would not make any sentencing recommendation--allowed him the opportunity to receive the sentence mandating service of a period of community service, as counsel requested (JA-8-9, 26-27, 46-47). The Government clearly violated the essence of its Plea Agreement by specifically disagreeing with the defense counsel's request that petitioner not be incarcerated (JA-47).

The Court of Appeals to excuse the breach of the Plea Agreement found that the comments of the Government in opposing the specific sentence request merely provided the District Court with "relevant information" (Appendix A, 3a).

It is respectfully submitted that this

violation of the essence of the Plea Agreement was on this record devastatingly prejudicial to petitioner's position (see Carbone, supra; Corsentino, supra; cf., United States v. Casamento, 887 F.2d 1141, 1181-1182 [2nd Cir. 1989], cert. denied, 493 U.S. 1081 (1990) -- where the defendant was not prejudiced by the Government's brief rebuttal statements which would have been proper had they been stated earlier in those proceedings).).

Nothing has been done to cure the prejudice petitioner suffered (cf., United States v. Brody, 808 F.2d 944, 946 [2nd Cir. 1986]--where subsequent proceedings in District Court cured any possible prejudicial effect of the breach of that Plea Agreement).

As such, the instant sentence should be vacated, and petitioner resentenced (see Carbone, supra; Corsentino, supra; see also United States v. Stolon, 561 F.Supp 63, 64-66 [E.D.N.Y. 1983]).

The Government can not be allowed to obtain

a defendant's cooperation, and once the cooperation has been successfully used, disregard the basis upon which that cooperation was obtained.

CONCLUSION

FOR THE REASONS ABOVE STATED, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

JOHN A. CIRANDO, ESQ.
D.J. & J.A. CIRANDO, ESQS.
Suite 1010
OnBank Building
101 South Salina Street
Syracuse, New York 13202
(315) 474-1285

Counsel of Record for Petitioner

Dated: May 25, 1993

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit, Dated April 8, 1993.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 8th day of April, one thousand nine hundred and ninety-three.

PRESENT:

HONORABLE JAMES L. OAKES,
HONORABLE LAWRENCE W. PIERCE,
HONORABLE GEORGE C. PRATT,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

against

THOMAS OOT,

Defendant-Appellant.

Docket No. 92-1769

This appeal from a judgment of the United States District Court for the Northern District of New York, Howard G.

Munson, *Judge*, came on to be heard on the transcript of the record and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment appealed from is hereby AFFIRMED.

After pleading guilty to conspiracy to distribute cocaine and marijuana (*see* 21 U.S.C. § 846) and conspiracy to defraud the United States by impeding the Internal Revenue Service (*see* 18 U.S.C. § 371, Thomas Oot was sentenced to concurrent terms of incarceration of 18 months on each count, a fine of $2,000, payment of all tax, interest, and penalties due the Internal Revenue Service, and a special assessment of $100. He contends that the government violated its plea agreement when it opposed his request for community service in lieu of incarceration, because the agreement provided that the government would not "recommend any specific sentence to the sentencing Judge."

Oot claims that the prohibition in the agreement against recommending a specific sentence restrained the government from commenting in any way on the type or severity of sentence to be imposed. Oot's reliance on *United States v. Carbone*, 739 F.2d 45 (2d Cir. 1984), and *United States v. Corsentino*, 685 F2d 48 (2d Cir. 1982), is misplaced. In *Carbone*, 739 F2d at 45, the government agreed to "make no recommendation * * * as to the sentence"; in *Corsentino*, 685 F.2d at 49, the government committed itself to "take no position" at sentencing. Unlike those agreements, Oot's plea agreement prohibited the government from recommending a "specific sentence" to the district court, not from discussing the sentence at all. Indeed, the plea agree-

ment here expressly permitted the government to present "any and all facts and arguments relevant to sentencing."

At the sentencing hearing, Oot's attorney requested a sentence of supervised community service in lieu of incarceration. Judge Munson asked the prosecutor for a response. After noting that the government had "agreed not to make any specific sentencing recommendation," the assistant United States attorney indicated that in light of the "factual findings" in the case, "I cannot concur with" defense counsel's request. The prosecutor's statements cannot be fairly read as a recommendation of a specific sentence; they merely constituted an argument "relevant to sentencing," which was permissible under the plea agreement.

Our decision in *United States v. Diamond*, 706 F.2d 105 (2d Cir. 1983), is instructive. There, the prosecutor submitted a memorandum urging the court to consider the severity of the defendant's crime, the damage inflicted on other people, the need for punishment, and the need for deterrence. *Id.* at 106. The *Diamond* plea agreement, like Oot's, prohibited the government from recommending a "specific sentence." We held that the prosecutor had not recommended "any specific sentence," but had simply supplied the court with "relevant information." *Id.*

We conclude that the prosecutor did not breech the plea agreement by opposing Oot's request for community service in lieu of incarceration.

The judgment of the district court is affirmed.

JAMES L. OAKES, U.S.C.J.

LAWRENCE W. PIERCE, U.S.C.J.

GEORGE C. PRATT, U.S.C.J.

UNITED STATES COURT OF APPEALS
FILED APR 8 1993
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Appendix B—United States Constitution, Fifth Amendment.

CONSTITUTION OF THE UNITED STATES

Amendment [V] [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix C—Federal Rules of Criminal Procedure, Rule 11(e).

RULES OF CRIMINAL PROCEDURE

RULE 11. Pleas

(e) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on

a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (e)(1)(A) or (C), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (e)(1)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the plea, and advise the defendant that if the defendant persists in a guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Plea Discussions, and Related Statements. Except as otherwise provided in this paragraph, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(A) a plea of guilty which was later withdrawn;

(B) a plea of nolo contendere;

(C) any statement made in the course of any proceedings under this rule regarding either of the foregoing pleas; or

(D) any statement made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.